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CRITICAL RACE PERSPECTIVES ON INTERNATIONAL LAW SYMPOSIUM

Framing Race and Law in Europe

CENGIZ BARSKANMAZ — 26 February, 2018

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To frame "Race and Law in Europe" involves a set of basic questions: 1) What is Race? 2) What is Law? and 3) What is Europe? The real challenge is to elaborate on the historical, epistemological, sociological and legal connections among these three questions without equating or reducing "race" to "racism", without reifying law as a monolithic field, and without homogenizing Europe. These themes deserve their own in-depth analyses, although one must always bear in mind that there are no quick and easy answers to such controversial and complex issues. I will explore these questions from an interdisciplinary and practical perspective. In doing so, I am particularly interested in reframing the way we think and analyse race and law in Europe in order to promote effective legal protection against racial discrimination and other related forms of discrimination. I will conclude my thoughts with a critical assessment of what I identify as the post-Holocaust ideology of "German Exceptionalism" which makes it impossible to understand the concept of *Rasse* as a social construct, and thus make it useful for non-discrimination law.

What is Race? Or: Race ≠ Racism

Today, race scholarship agrees on the axiomatic phrase "race is a social construct." While it is not particularly enlightening or inspiring to point out that race – like gender, ethnicity, color, etc. – is a social construct, still little in-depth knowledge has been produced on *what* the constructedness of race really means and *how* race operates in everyday life. This is particularly the case for scholarship on racism, migration, gender and, most importantly, intersectionality in the German context. Furthermore, does the social constructedness of race imply that there is no materiality to race at all, or is this so-called materiality already embedded in a socially constructed world? These questions, obviously, could provoke different answers according to the discipline in which you challenge them. For a biologist (as well for other disciplines such as philosophy), race has been a very contentious category for classifying human groups and ranking them in terms of superiority. Even though scientific research in genetics provides compelling evidence that there is no genetic or biological basis for race, the medical discourse continues to call for a race-conscious healthcare to accommodate the health issues that certain racial groups suffer from significantly more than other groups. No doubt racism – a system of exclusion and oppression – historically has had an adverse impact on the health conditions of people who have been affected by it, but to what extent is it really relevant and necessary to use the racial frame in the health sector? One could argue that, in the long run, promoting a race-blind healthcare – or legal – system may cause more

harm than bringing advancement to the health situation of racial groups.

This consideration shows that not every reference to or use of race necessarily implicates racism. Thus "equating race with racism" is a sinful mistake made by scholars, activists, lawyers, and policy makers who are not aware of the profound social meaning of race. One could call this conduct "racial deadlock", i.e., "race only does bad things." This is the very mechanism which takes place when policy makers demand that the term race be banned from the constitution altogether, e.g. in Article 3 Section 3 of the German Constitution. Another example that shows that not every reference to race implicates racism can be found in identity politics. Calling oneself Black and promoting Black politics is performing racial identity politics, which manifestly reinforces race as a performative social category. Black is a political identity, yes, but also a racial one. No one would accuse a Black organization of perpetuating racist self-identification because they foreground Blackness. In return, to call or describe a person as white is not a racist marker, but a race-conscious designation of certain privileges. Here it becomes clear that a distinction between race and racism is more crucial than ever.

The "racial deadlock" can go as far as official bodies, such as the Federal Agency for Non-Discrimination's (*Antidiskriminierungsstelle des Bundes*) systematic avoidance of the notion of race, even though the legal framework of the Agency (*Allgemeines Gleichbehandlungsgesetz*) includes race. The Agency only uses the notion "ethnic origin", which certainly does not include race. Since Blacks have been constructed as a racial rather than an ethnic group, it is hardly convincing to classify the form of discrimination they suffer as ethnic discrimination. In other words, ethnicity, be it in non-discrimination law or in social science, should not be seen in a dichotomous relation to race. Moreover, and in many cases, race and ethnicity are not even separable or they can converge, which is why the EU Race Directive (2000/43/EC) contains "racial and ethnic origin" in order to secure legal protection against any form of racial and/or ethnic discrimination.

The International Convention on the Elimination of All Forms of Racial Discrimination of 1965 (ICERD) is an example of an older legal framework that rests on an understanding of race as a multi-layered concept. Article 1 ICERD states that racial discrimination is to be understood as any "distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life." Strikingly, the ICERD and the EU Race Directive have been characterized as *Antirassismuskonvention* ("anti-racism convention", see e.g. German Institute for Human Rights) and *Antirassismusrichtlinie* ("anti-racism directive") respectively. Here again one can observe that race has become racism (or in this case anti-racism) in the German (speaking) context. This "lost in translation" is all but accidental – it is, in fact, paradigmatic of the "racial deadlock."

Race and Law

These observations lead us to the question: what does race mean *for* and *in* the law? Answering this question unavoidably provokes a discussion about the historical entanglement of race and law. Colonialism, slavery, Apartheid, National Socialist law, and the implementation of these legal regimes by the respective courts have played a major role in defining not only who is white or a Jew, but also in dehumanizing those people on the wrong end of the various classification systems (e.g., turning Africans into slaves). Today, however, race meets law only in non-discrimination law. Opponents of race argue

that the legal term race upholds the idea that biological races exist. Oddly, the same argument about skin color is not made. Some legal scholars even argue that race should be replaced by color. But isn't color the most prominent indicator of race? And yet, color is just as much of a social construct. What about other grounds of discrimination such as ethnicity, nationality, sex, and disability, which are no less social and historical constructs, and consequently by no means less problematic than race? To reflect on the ambiguity of race and other grounds of discrimination is not to reject them or to go beyond them, as the advocates of the "post-categorical" approach have been promoting recently. In a highly racialized (and gendered) world, there can be no "beyond race." Race-blindness is *per se* utopian. Post-racialism (e.g. Cho, Post-Racialism), however tempting, remains delusive.

These questions and observations reveal the analytical weaknesses of the anti-race discourse. Such a discourse is harmful to the anti-racist struggle because it does not differentiate between *law against race* discrimination and race discrimination *through law* (e.g. Lopez, White by Law). Additionally, it is at odds with the non-discrimination legal framework, and is inconsistent with the characteristics and dynamics of legal texts respectively. Legal terms can be interpreted through a wide range of methods of interpretation, including grammatical, contextual (systematic), historical, and teleological. Law is indeterminate; this is what we have learned from critical legal theory. The law is used to dealing with concepts that lack clear content and which must be substantiated through interpretation.

Finally, can reasonable and effective affirmative action policies circumvent the concepts of race, gender, religion, ethnicity, and nationality? In fact, racial-, ethnic- or gender-based affirmative action measures are compelling examples of the constructive use of race, ethnicity and gender to make distinction, while at the same time not promoting racism or sexism. On the contrary, race-sensitive measures are not equal to racist policies. As such, racial and/or ethnic data are much needed to measure structural racial discrimination or, in legal terms, to prove disparate impact. The newly founded *Center for Intersectional Justice (CIJ)* (www.intersectionaljustice.org) can be regarded as an example of best practice in how to advocate for retaining race, gender, religion, sexuality, and ethnicity – in all their complexity – for practical use.

Race and Law in Europe

After having discussed race and its (constitutive) relation to law, it becomes essential to locate race and law in time and space. Race is not an abstract concept; it is, rather, genuinely contingent. Race in North America differs from race in South America, and race in Europe is not identical to race in Africa. Therefore, it is necessary to contextualize and compare race. Establishing contrast and difference, however, cannot be the sole goal of a comparative approach. It produces far more insight to elaborate on the commonalities and relationalities of race and racial discourses between various racial contexts. Bearing the contingency and the varying semantics of race in mind, race critique in Germany, therefore, cannot avoid the term *Rasse*. Talking about race in Germany, for sure, takes place in a post-Holocaust context, where major concerns about the usage of the term *Rasse* are understandable. But from an analytical and a legal (domestic, European and international law) point of view, *Rasse* is unavoidable. Therefore, putting *Rasse* in quotation marks, using the English notion "race", or replacing it with color, ethnicity, or racism simply gives us a reprieve from the real work to be done: race-conscious legal thinking and reasoning. A race-conscious thinking in Europe, and specifically in Germany, needs to link the post-Holocaust with the post-colonial context in order to re-locate

Rasse in a global and local context. Doing so, "German Exceptionalism", i.e. the hegemonic idea that because of the "exceptional German past" today the "German context" needs to be regarded as exceptional, can be deconstructed (for a more detailed account of German Exceptionalism (in German), see Barskanmaz, p. 387 f.; Ulrich, p. 99 ff.). In the German context, "German racism", and therefore German *Rasse*, is considered a vicious exceptional phenomenon that is incomparable to any other racial formation. Today's affective and moral economies of the post-Holocaust make it impossible to deepen the understanding of *Rasse* as a social construct, because in German Exceptionalism *Rasse* is deemed to be inherently negative. This atomic, isolated, and provincial understanding of *Rasse* and "German racism" needs to be de-provincialized and revisited.

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